BRB No. 09-0822 BLA

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| JOHN W. WONDOLOSKI | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | DATE ISSUED: 09/30/2010 |
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| SKYTOP CONTRACTING COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| LACKAWANNA CASUALTY COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-05446) of Administrative Law Judge Janice K. Bullard rendered on a request for modification of a subsequent claim filed on January 5, 2005, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The procedural history of the case is as follows. Claimant filed an initial claim for benefits on September 30, 1981, which was denied by Administrative Law Judge Frank J. Marcellino in a Decision and Order dated August 11, 1987. Director's Exhibit 1. Judge Marcellino found that while the evidence was sufficient to establish the existence of pneumoconiosis, claimant failed to establish that he was totally disabled. *Id*. Claimant filed a request for modification on July 7, 1988, which was denied by Administrative Law Judge Robert D. Kaplan on January 18, 1991. *Id*. Pursuant to claimant's appeal, the Board and, subsequently, the United States Court of Appeals for the Third Circuit, affirmed Judge Kaplan's Decision and Order. *Wondoloski v. Skytop Contracting Co.*, No. 93-3222 (3d Cir. Dec. 7, 1993) (unpub.); *Wondoloski v. Skytop Contracting Co.*, BRB No. 91-0770 BLA (Mar. 18, 1993) (unpub.); Director's Exhibit 1.

Claimant next filed a petition for modification on October 14, 1994, which was denied by the district director on January 18, 1995. *Id*. Claimant requested a hearing, which was scheduled for December 5, 1995. Prior to the hearing, however, claimant filed a November 9, 1995 letter, indicating that he no longer wished to pursue his claim. *Id*. In an Order dated November 21, 1995, Administrative Law Judge Ainsworth H. Brown cancelled the scheduled hearing and granted claimant's "application to withdraw the modification petition of October 14, 1994." *Id*. The case file was then administratively closed by the district director.

Claimant filed a subsequent claim on January 5, 2005. Director's Exhibit 3. In a Decision and Order issued on January 4, 2007, Administrative Law Judge Ralph A. Romano found that the newly submitted evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b), and that claimant was not entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Thus, Judge Romano found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and he denied benefits. Claimant filed a request for modification on November 15, 2007, which was denied by the district director on February 5, 2008. Director's Exhibits 54, 65. Claimant requested a hearing, and the case was forwarded to the Office of Administrative Law Judges and assigned to Judge Bullard (the administrative law judge). In a Decision and Order issued on July 30, 2009, which is the subject of this appeal, the administrative law judge credited claimant with fourteen years of coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the evidence submitted in conjunction with the modification

request failed to establish the presence of pneumoconiosis, total disability or total disability due to pneumoconiosis and, therefore, failed to demonstrate a change in conditions. The administrative law judge also concluded that there was no mistake in a determination of fact with regard to Judge Romano's denial of benefits. Accordingly, the administrative law judge denied modification pursuant to 20 C.F.R. §725.310 and denied benefits.

On appeal, claimant asserts that the administrative law judge applied an inconsistent standard in finding that good cause existed for admitting the deposition testimony of Dr. Scott, in excess of the evidentiary limitations, while failing to find that claimant also demonstrated good cause for admitting the medical report of Dr. Kraynak. Claimant challenges the administrative law judge's finding that he is not entitled to invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. Claimant argues that the administrative law judge failed to properly consider the treatment records diagnosing complicated pneumoconiosis, mischaracterized record evidence, and did not explain the basis for her credibility findings, as required by the Administrative Procedure Act.[1] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

## I. EVIDENTIARY LIMITATIONS

### Dr. Kraynak's Report

Claimant asserts that the administrative law judge erred in excluding Dr. Kraynak's report, while admitting the deposition testimony of Dr. Scott. The record reveals that, with respect to his January 5, 2005 claim, claimant submitted, as his two affirmative case medical opinions, a medical report by Dr. Santarelli, dated February 21, 2006, and a medical report by Dr. Kraynak, dated May 18, 2006. Director's Exhibits 44, 45. In support of his modification request, claimant submitted to the district director a November 27, 2007 medical report by Dr. Kraynak. Director's Exhibit 58. At the September 5, 2008 hearing, claimant also proffered a January 10, 2007 medical report by Dr. Dittman, marked as Claimant's Exhibit 1. *See* Hearing Transcript at 10-14. Employer objected at the hearing to the admission of Dr. Dittman's opinion, asserting that claimant had exceeded his limit of allowable medical reports (two affirmative medical reports, and one additional medical report on modification). *Id*. at 10. Employer also noted that Dr. Dittman "relie[d] upon evidence that is not in the record." *Id*. Claimant's counsel argued that, while Dr. Dittman's opinion was proffered in excess of the evidentiary limitations, it was relevant and probative to the issue of complicated pneumoconiosis and should be admitted into the record. *Id*. at 11-14. The administrative law judge ruled, however, that relevancy alone did not justify admitting Dr. Dittman's report. Claimant's counsel then altered her proffer of evidence, and withdrew Dr. Kraynak's report, substituting Dr. Dittman's report as her third allowable medical report:

> [Administrative Law Judge]: You'd be arguing for good cause I guess, to extend that. But as I say, I -- just the fact that it's relevant and probative, it's not sufficient for me to grant good cause.
>
> [Claimant's counsel]: So then we'll be withdrawing Dr. Kraynak's report and pulmonary function study from the Director's exhibits. And that would also then include withdrawal of [Claimant's Exhibits] 5 and 6.

*Id*. at 14.

Claimant asserts in this appeal that, despite the evidentiary limitations, because Dr. Kraynak is a treating physician and "provided one of the initial medical opinions on this claim . . . his additional records and deposition testimony [are] permitted by the governing regulations." Brief in Support of Petition for Review at 3. Thus, claimant

maintains that both the report of Dr. Dittman and that of Dr. Kraynak should have been admitted by the administrative law judge into the record. We disagree.

The regulations at 20 C.F.R. §§725.414 and 725.310(b) establish combined evidentiary limitations on modification. *See* 20 C.F.R. §§725.2(c), 725.414, 725.310(b); *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). The applicable provisions permit claimant to submit two medical reports in support of his affirmative case, pursuant to 20 C.F.R. §725.414(a)(2)(i), and one medical report on modification, pursuant to 20 C.F.R. §725.310(b). Any evidence submitted must be consistent with the evidentiary limitations at 20 C.F.R. §§725.414 and 725.310(b). If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

An administrative law judge is empowered to conduct formal hearings and is given broad discretion in resolving procedural matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Thus, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *Clark*, 12 BLR at 1-153. Based on the facts of this case, we hold that claimant has not met this burden.

Contrary to claimant's contention, the administrative law judge properly stated that while both Dr. Dittman and Dr. Kraynak addressed the issue of complicated pneumoconiosis, "relevancy and probity of the evidence [does] not constitute good cause to exceed the limitations established by 20 C.F.R. §725.414." Decision and Order at 3; *see Dempsey*, 23 BLR at 1-62. We also reject claimant's argument that, insofar as Dr. Kraynak's May 18, 2006 medical opinion was submitted as affirmative evidence in his January 5, 2005 subsequent claim, Dr. Kraynak's subsequent report of November 27, 2007 should be admissible, notwithstanding the evidentiary limitation at 20 C.F.R. §725.310(b).[3] Dr. Kraynak's two medical reports constitute two separate written

[3] The regulation at 20 C.F.R. §725.310(b) provides, in relevant part:

> Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator . . . shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414.

assessments of claimant's pulmonary condition at two different times, and must be treated as two separate medical reports for purposes of the evidentiary limitations. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006). Because claimant has not demonstrated an abuse of discretion by the administrative law judge in applying the evidentiary limitations to claimant's modification evidence pursuant to 20 C.F.R. §§725.414, 725.310, we reject claimant's assertion that Dr. Kraynak's opinion should have been admitted into the record. *See Dempsey*, 23 BLR at 1-62.

**Dr. Scott's Deposition Testimony**

At the September 5, 2008 hearing, employer proffered the deposition testimony of Dr. Scott, a Board-certified radiologist and B reader, regarding his negative reading of the x-ray dated November 13, 2007. 2008 Hearing Transcript at 17-22. Claimant contends that the administrative law judge erred in permitting employer to submit the deposition testimony of Dr. Scott, although it did not comply with evidentiary requirements of 20 C.F.R. §725.414(c) We disagree.

The regulations provide that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition . . . unless that person meets the requirements of 20 C.F.R 725.414(c)." 20 C.F.R. §725.457(c). Pursuant to 20 C.F.R. §725.414(c), "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." 20 C.F.R. §725.414(c). The deposition testimony of a physician who has not prepared a medical report, but has reviewed objective tests, such as an x-ray, may also testify and his or her deposition may be admitted "in lieu of" a medical report if the party proffering the evidence has "submitted fewer than two medical reports as part of [its] affirmative case . . . ." 20 C.F.R 725.414(c).

In this case, because employer had already submitted two affirmative case medical reports and a third medical report on modification,[4] Dr. Scott's deposition testimony was not admissible, under 20 C.F.R. §725.414(c), in the absence of good cause. Contrary to claimant's contention, we see no prejudicial error in the administrative law judge's decision to allow the deposition testimony of Dr. Scott, based on a finding of good cause,

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20 C.F.R. §725.310(b).

[4] Employer proffered the examination report of Dr. Hertz, dated March 9, 2005, and the consultative report of Dr. Kaplan, dated May 10, 2006, as affirmative case medical opinions before Administrative Law Judge Ralph Romano, and the November 13, 2007 examination report of Dr. Hertz on modification before the administrative law judge. Employer's Exhibit 1 (January 5, 2005 claim); Director's Exhibit 63.

as she noted that the "test results produced widely varying results, including an opinion [by Dr. Smith][5] regarding the presence of complicated pneumoconiosis, which would trigger certain presumptions," and she believed the deposition testimony would offer a "complete explanation" regarding the x-ray readings. Decision and Order at 3. Moreover, claimant has not demonstrated prejudicial error, based on the administrative law judge's evidentiary ruling, since the administrative law judge permitted claimant to obtain and submit the deposition testimony of Dr. Smith, who interpreted the same x-ray as Dr. Scott. Because the administrative law judge reasonably exercised her discretion in resolving this procedural matter, we reject claimant's assertion that the administrative law judge erred in finding good cause to admit Dr. Scott's deposition testimony under 20 C.F.R. §725.414(c). *See Dempsey*, 23 BLR at 1-62; *Clark*, 12 BLR at 1-152; *Morgan*, 8 BLR at 1-491.

## II. MERITS OF ENTITLEMENT

### Modification of a Subsequent Claim

Initially, we note that the administrative law judge erred in concluding in her Decision and Order that claimant's January 5, 2005 claim was not a subsequent claim:

> In his Decision and Order, ALJ Romano treated [c]laimant's claim of January 5, 2005 as a subsequent claim. This appears to be erroneous, as [c]laimant's only prior claim, which was filed on September 30, 1981, was withdrawn by Order dated November 21, 1995 after a lengthy procedural process that included denial of an appeal by the Court of Appeals. Pursuant to 20 C.F.R. §725.306(b), "[w]hen a claim has been withdrawn . . ., the claim will be considered not to have been filed." Accordingly, ALJ Romano's treatment of the claim filed on January 5, 2005 constitutes a mistake of law, not of fact, and has no substantive effect on the adjudication of the instant request for modification of his claim.

Decision and Order at 22 n.8. Contrary to the administrative law judge's analysis, the November 21, 1995 Order issued by Judge Brown, as discussed *supra* at 3, granted withdrawal of claimant's pending October 14, 1994 modification request, but not the underlying claim of September 30, 1981. Director's Exhibit 1. Claimant could not withdraw his September 30, 1981 claim, pursuant to 20 C.F.R. §725.306(b), as there had already been a decision on the merits of the claim issued by an adjudication officer, as of the date when claimant made his request for withdrawal. *See Clevenger v. Mary Helen*

[5] Dr. Smith, a Board-certified radiologist and B reader, offered a conflicting positive reading for complicated pneumoconiosis of the November 13, 2007 x-ray.

*Coal Co.*, 22 BLR 1-193 (2002) (*en banc*). Thus, because claimant's initial claim, filed on September 30, 1981, could not be withdrawn, the January 5, 2005 claim constitutes a subsequent claim pursuant to 20 C.F.R. §725.309. Although the administrative law judge erred in treating the January 5, 2005 claim as an initial claim, and not a subsequent claim, her error was not adverse to claimant and is deemed harmless, as she performed a review on the merits of all of the evidence submitted with the January 5, 2005 claim and the 2007 modification request, in reaching her findings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In order to establish entitlement to benefits based on his January 5, 2005 subsequent claim, claimant is required to establish that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because claimant's prior claim, filed on September 30, 1981, was denied because the evidence did not establish a totally disabling respiratory or pulmonary impairment, claimant must establish, based on the newly submitted evidence, that he is totally disabled, in order to obtain review of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2), (3).

Additionally, because this case also involves a 2007 request for modification of the denial of claimant's January 5, 2005 subsequent claim (based upon a failure to establish a change in an applicable condition of entitlement), the administrative law judge is required to determine whether any new evidence submitted with the request for modification, considered in conjunction with the evidence developed in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The administrative law judge must also consider whether the denial of the subsequent claim contained a mistake in a determination of fact, based on all of the evidence of record. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). If the evidence establishes a change in an applicable condition of entitlement or a mistake in a determination of fact, the administrative law judge must then consider the merits of the subsequent claim. *Hess*, 21 BLR at 1-143.

In considering whether claimant was entitled to modification of his January 5, 2005 claim, the administrative law judge concluded that there was no mistake in a determination of fact with regard to Judge Romano's denial of benefits. She further found that claimant failed to establish a change in conditions by proving that he is totally disabled. Specifically, the administrative law judge found that claimant was not able to invoke the irrebuttable presumption of total disability due to pneumoconiosis, by establishing the presence of complicated pneumoconiosis, pursuant to 20 C.F.R.

§718.304, and she found that the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

Claimant asserts that the administrative law judge erred in finding that he does not have complicated pneumoconiosis.[6] Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (*en banc*); *Truitt v. North American Coal Corp*., 2 BLR 1-199 (1979).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge weighed the x-ray evidence to determine whether claimant established the existence of simple or complicated pneumoconiosis. The administrative law judge considered three readings of two x-rays dated November 13, 2007 and November 29, 2007, which were submitted by the parties on modification. The administrative law judge found that the November 13, 2007 x-ray was read by Dr. Scott, a dually qualified Board-certified radiologist and B reader, as negative for simple and complicated pneumoconiosis, while Dr. Smith, a dually qualified Board-certified radiologist and B reader, read the same film as positive for simple and complicated pneumoconiosis. Decision and Order at 8; Director's Exhibit 60; Claimant's Exhibit 7. With respect to the November 29, 2007 x-ray, the administrative law judge found that it had only one reading, by Dr. Pickerill, a dually qualified Board-certified radiologist and B reader, as positive for simple and complicated pneumoconiosis. Decision and Order at 8, 15; Claimant's Exhibit 4.

[6] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant did not establish, based on the newly submitted evidence, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), (4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and her finding that the prior denial does not contain a mistake in a determination of fact. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge also considered the deposition testimony of Drs. Scott and Smith, relevant to their x-ray readings at 20 C.F.R. §718.304(a). In a deposition conducted on July 29, 2008, Dr. Scott testified that the November 13, 2007 x-ray showed no small or large opacities consistent with pneumoconiosis, but he identified bilateral apical infiltrates and scarring consistent with tuberculosis or some other inflammatory process. Employer's Exhibit 1 at 21. He noted that there were nodular and linear infiltrates in the upper part of the lung, including portions which were "pulled up a little bit," rather than "multiple distinct, tiny round nodules." *Id*. at 19. He stated that this was indicative of scarring and healing which can occur with any disease. *Id*. Dr. Scott further noted the presence of widespread "calcified granulomas in the hilar regions," which he likewise attributed to either healed tuberculosis or histoplasmosis. *Id*. Dr. Scott diagnosed partially healed tuberculosis, but further noted that "severe sarcoid could look like that," although such a condition was more likely to appear in the lower lung zones. *Id*. at 20. Dr. Scott concluded that there was no evidence of coal workers' pneumoconiosis on this x-ray. *Id*. at 21.

In a deposition conducted on March 3, 2009, Dr. Smith testified that he reviewed the November 13, 2007 x-ray, as well as three prior x-rays dated February 15, 2005, March 9, 2005 and February 17, 2006, all of which revealed primarily "r" size rounded opacities, and complicated pneumoconiosis. Claimant's Exhibit 10 at 17-28. He stated that the November 13, 2007 x-ray was Grade 1 quality, but "still looks a tad lighter" and "you might tend to overread [it] and see something that looks like opacities." *Id*. at 30. Dr. Smith disagreed with Dr. Scott that the opacities seen on x-ray could be due entirely to healed tuberculosis, although he conceded that he was "not saying that there [could not] be a little of the [tuberculosis] in there," just that it was not the primary condition, which was coal workers' pneumoconiosis. *Id*. at 33. He opined that claimant's x-ray findings were not compatible with other potential etiologies identified by Dr. Scott, such as fungal disease, histoplasmosis, sarcoid or granulomas, and testified that he believed the linear densities were more consistent with coal workers' pneumoconiosis. *Id*. at 33-34. Dr. Smith identified eggshell calcifications on the March 2005 x-ray, but noted that it was consistent with both coal workers' pneumoconiosis and granulomatous disease. *Id*. at 43. In addition, Dr. Smith conceded that the increased "pulling of the hilar region" could be due to some condition other than coal workers' pneumoconiosis. *Id*. at 48. However, Dr. Smith testified that "medically speaking[,] I don't see how we could just say it's tuberculosis without saying it's . . . very equally or if not a greater chance that it's . . . large opacities from pneumoconiosis." *Id*. at 53.

In resolving the conflict in the readings of the November 13, 2007 x-ray, the administrative law judge gave controlling weight to Dr. Scott's negative reading for complicated pneumoconiosis. She further found that the "unchallenged November 29, 2007 x-ray is positive for the presence of complicated pneumoconiosis." Decision and Order at 17. Because the two x-rays of November 13, 2007 and November 29, 2007

were in equipoise, the administrative law judge concluded that claimant did not establish the existence of complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a).[7]

On appeal, although claimant states that the administrative law judge "clearly mischaracterized the detailed testimony of Dr. Smith concerning the x-ray findings in this case," claimant does not explain how the administrative law judge erred with specific references to the deposition transcript or the administrative law judge's Decision and Order. Brief in Support of Petition for Review at 4-5. Therefore, claimant has failed to adequately raise or brief this issue. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983)

Claimant also contends that the administrative law judge failed to properly explain the bases for his credibility determinations. We disagree. The administrative law judge found Dr. Smith's testimony, attributing claimant's large opacities to complicated pneumoconiosis, to be equivocal, quoting the following passage in Dr. Smith's deposition:

> So the other thing that you sometimes see with large opacities [is] . . . post cicatrical fibrosis or emphysema . . . . And what that means is because it pulls the lungs parenchyma into it, this large opacity, you get a darker area here; and as I look at it, I think, well, I almost can see a little darker area here than the rest of the lung, and possibly a little bit of that over here too. It's . . . just an observation. I'm not saying it's a hundred percent; but you know, everything kind of points to large opacities.

Decision and Order at 15, *quoting* Claimant's Exhibit 10 at 35-36. The administrative law judge found Dr. Smith's statement that "medically speaking, I don't see how we could just say it's tuberculosis without saying it's very equally or if not a greater chance that it's . . . large opacities from pneumoconiosis" to be equivocal regarding whether claimant's x-ray changes were attributable to complicated pneumoconiosis or tuberculosis, as alleged by Dr. Scott. Decision and Order at 15, *quoting* Claimant's Exhibit 10 at 53. Furthermore, the administrative law judge determined that Dr. Smith's x-ray readings were inconsistent, noting that "although he testified that earlier films showed opacities in the lower lung, he did not note those on the ILO form that he used to report his interpretation." Decision and Order at 16. The administrative law judge further concluded that Dr. Smith "did not provide a well-reasoned explanation for finding

[7] The administrative law judge also found that claimant did not establish the existence of simple pneumoconiosis, based on these same x-ray readings. Decision and Order at 17.

smaller opacities on the 2007 film than what he found on readings of films from 2005." *Id*. at 16. Additionally, the administrative law judge questioned the reliability of Dr. Smith's opinion, noting that he "admitted that he generally reads [x]-rays as positive for pneumoconiosis, explaining, that his clients are seeking that type of diagnosis, and typically send him positive [x]-rays." *Id*.

When compared to Dr. Smith's opinion regarding the presence of complicated pneumoconiosis, the administrative law judge found that Dr. Scott's negative reading of the November 13, 2007 x-ray was more persuasive. The administrative law judge found that "Dr. Scott's testimony is organized, consistent and definitive" and "his clinical experience adds weight to his opinion." Decision and Order at 17. Because the administrative law judge has discretion to assess the credibility of the medical experts, we affirm the administrative law judge's decision to accord less weight to Dr. Smith's opinion and controlling weight to Dr. Scott's opinion. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (*en banc*). Because the administrative law judge acted within her discretion in finding Dr. Smith's x-ray opinion to be less persuasive than Dr. Scott's opinion, and claimant does not specifically challenge the weight accorded to the opinion of Dr. Scott, we reject claimant's assertion of error and affirm the administrative law judge's finding that, because the x-rays were in equipoise as to the existence of complicated pneumoconiosis, claimant failed to satisfy his burden at 20 C.F.R. §718.304(a).

Claimant next asserts that the administrative law judge erred in failing to find that "the overwhelming weight of the medical opinions" establishes that he has complicated pneumoconiosis. Brief in Support of Petition for Review at 5. Claimant contends that the administrative law judge did not offer an adequate explanation for crediting the opinion of Dr. Hertz and did not properly consider Dr. Santarelli's treatment notes. We disagree.

As noted by the administrative law judge, Dr. Hertz examined claimant on November 13, 2007, and concluded that there was no evidence that claimant suffered from coal workers' pneumoconiosis, "given current findings with recent history, physical examination, chest x-ray review and pulmonary function testing." Director's Exhibit 63. He opined that claimant's chest x-ray revealed evidence of calcified scarring in both upper lobes, consistent with granulomatous disease, such as potential tuberculosis, fungal disease or sarcoid. *Id*. He also noted that claimant's pulmonary function tests and arterial blood gas tests are normal. *Id*. Dr. Hertz stated that one "would expect that if [claimant] had significant or disabling coal workers' pneumoconiosis, that we would find evidence for exercise-induced hypoxemia." *Id*. In a deposition conducted on September 29, 2008, Dr. Hertz testified that the pattern of scarring demonstrated on claimant's x-ray was a different pattern than typically seen with complicated pneumoconiosis, and

attributed claimant's condition to either fungal disease, tuberculosis or granulomatous disease. Employer's Exhibit 3.

In treatment records spanning from January 31, 2006 to July 13, 2006, Dr. Santarelli diagnosed complicated coal workers' pneumoconiosis, based on a February 7, 2006 chest x-ray. Claimant's Exhibit 11. Dr. Dittman examined claimant on January 10, 2007, in conjunction with a state workers' compensation claim. In his report, he noted that an x-ray was interpreted by Dr. Pickerill as positive for pneumoconiosis with the presence of large "B" type opacities. Claimant's Exhibit 1. He also noted that claimant's pulmonary function study suggested a "mild obstructive defect without improvement after bronchodilators," but that claimant's "effort for the study was somewhat inconsistent . . . [and] values must be taken with consideration of the [claimant's] effort for the testing." *Id.* Dr. Dittman opined that claimant suffers from complicated coal workers' pneumoconiosis, based on x-ray and an obstructive defect on pulmonary function testing. *Id.*

In weighing the conflicting medical opinions, the administrative law judge accorded some weight to Dr. Dittman's opinion, noting that while it was "generally supported by the record that he reviewed," Dr. Dittman based his opinion, in part, on x-ray evidence, and the administrative law judge considered the x-ray evidence to be in equipoise as to the existence of complicated pneumoconiosis. Decision and Order at 18. The administrative law judge found that the diagnosis of complicated pneumoconiosis in Dr. Santarelli's treatment notes "supports Dr. Dittman's opinion only, and does not constitute a separate medical opinion within the framework of the regulatory scheme applicable to this adjudication." *Id.* In contrast, the administrative law judge considered Dr. Hertz's opinion, that claimant does not have complicated pneumoconiosis, to be "consistent with the preponderance of the reliable evidence" and entitled to controlling weight. Decision and Order at 21. Therefore, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.*

We reject claimant's contention that the administrative law judge "failed to adequately explain her rejection of the opinion of Dr. Santarelli." Brief in Support of Petition for Review at 3. The administrative law judge specifically considered Dr. Santarelli's treatment notes,[8] and found that they referenced x-ray evidence for

[8] Claimant submitted, as Claimant's Exhibit 11, treatment notes by Dr. Santarelli dated July 13, 2006, February 21, 2006, and January 31, 2006. Attached to these treatment notes was a letter addressed to claimant's attorney from Dr. Santarelli, stating that claimant was totally disabled due to complicated pneumoconiosis. Claimant's Exhibit 11. The administrative law judge indicated that she did not consider the letter, as it constituted a separate medical report. Decision and Order at 7 n. 3. The

complicated pneumoconiosis, and were generally supportive of Dr. Dittman's opinion. However, the administrative law judge permissibly concluded that both Dr. Santarelli's treatment notes, and Dr. Dittman's opinion diagnosing complicated pneumoconiosis, were entitled to less weight in light of the administrative law judge's finding that the x-ray evidence was insufficient to establish that claimant had complicated pneumoconiosis. The administrative law judge was also persuaded by the reasoned and documented opinion of Dr. Hertz, that claimant did not have complicated pneumoconiosis, noting that he explained that "the pattern of scarring that he noted [on x-ray] was not typical of the pattern seen in patients that are diagnosed with pneumoconiosis" and that claimant's pulmonary function testing did not support a diagnosis of complicated pneumoconiosis. Decision and Order at 18.

Because the administrative law judge permissibly exercised her discretion in rendering her credibility determinations in this case, we affirm her finding that the medical opinion evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *See Balsavage*, 295 F.3d at 397, 22 BLR at 2-396; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, 12 BLR at 1-153. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We therefore affirm the administrative law judge's conclusion that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis and that he failed to demonstrate a change in conditions. Because claimant did not establish a basis for modification, we affirm the administrative law judge's denial of benefits.

**Amendments to the Act**

By Order dated June 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Wondoloski v. Skytop Contracting Co.*, BRB No. 09-0822 BLA (June 7, 2010) (unpub. Order). In pertinent part, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes at least fifteen years of underground coal mine employment or coal mine employment in substantially similar conditions, and a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In addition, if the presumption is invoked, the burden of proof shifts

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administrative law judge properly noted that because claimant had submitted the opinion of Dr. Dittman on modification, he was not entitled to submit an additional affirmative medical opinion by Dr. Santarelli under the evidentiary limitations. *Id*.

to employer to show either that the miner does not have pneumoconiosis or that the total disability "did not arise out of, or in connection with," coal mine employment. *Id*. Both employer and the Director have responded to the Board's Order.

Employer argues that, although Section 1556 is applicable, based on the January 5, 2005 filing date of the claim, claimant is not entitled to the Section 411(c)(4) presumption because he is not totally disabled by a respiratory or pulmonary impairment. The Director responds, agreeing that the case is affected by the amendments, based on the filing date of the claim. The Director further argues that, insofar as the administrative law judge's finding of fourteen years of coal mine employment was based on the parties stipulation, and the administrative law judge did not calculate the precise number of years of coal mine employment, the Board should vacate the administrative law judge's length of coal mine employment finding and remand the case for consideration as to whether claimant may invoke the Section 411(c)(4) presumption.

Based upon the parties' responses, and our holdings in this appeal, we agree with employer that, although this case is affected by Section 1556, a remand to the administrative law judge is not required, as we have affirmed the administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment and a basis for modification of the denial of his claim pursuant to 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge